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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CPG PRODUCTS CORP. AND GENERAL MILLS
FUN GROUP, INC.,

Petitioners,

v.

ANTI-MONOPOLY, INC.,

Respondent.

Brief in Opposition to the 7 Motions
for Leave to File Briefs Amicus Curiae

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Anti-Monopoly, Inc. ("respondent"
or "Anti-Monopoly") hereby opposes, and
files this brief in opposition to, the
seven motions by various organizations
and one corporation seeking leave to file
amicus curiae briefs in support of the

petition of by CPG Products Corp. and General Mills Fun Group, Inc. ("petitioner" or "Parker Brothers") for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Ninth Circuit in Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., No. 81-4281, issued on August 26, 1982.

By letter dated January 27, 1983, petitioner's attorney of record, Nathan Lewin, requested this Court's Clerk, Hon. Alexander L. Stevas, to present to this Court Mr. Lewin's letter requesting this Court to invite the Solicitor General to file an amicus brief. Anti-Monopoly has responded in opposition to such letter, with a letter dated January 29, 1983, from respondent's attorney, Carl E. Person, requesting that the letter in opposition also be presented to this Court. Mr.

Lewin's practice of soliciting requests for amici curiae no doubt produced the 7 amici curiae motions to which respondent now responds, based upon Mr. Lewin's distortions and misstatements of the record. It might be noted that the attorney for the Chamber of Commerce was petitioner's attorney in the first appeal to the Ninth Circuit herein, which he (Dean A. Olds, Esq.) does not point out to this Court; nor does Oliver P. Howes, Esq., a trademark lawyer in New York City for the past 20 years or so, point out his apparent

1. Incidentally, after indicating it was going to file an amicus motion, The Coca-Cola Company, Inc. decided not to, after respondent filed its brief in opposition and after advising respondent's attorney of record that the Ninth Circuit had just upheld the Coke trademark. Also, petitioner's own organization, The Toy and Game Manufacturers Association of America, after indicating it was going to file an amicus motion, apparently decided not to do so. Probably because of footnote 3, p. 11 of the motion of the DC Bars, which indicates that "trademark registrations for games are suspect in general".

membership in the United States Trademark Association (of which petitioner's in-house attorney Berman is a member of the Board of Directors) or the Committee on Trademarks and Unfair Competition of the Association of the Bar of the City of New York. Also, petitioner is a member of proposed amicus curiae The Grocery Manufacturers of America, Inc. Mr. Lewin does not negate any memberships or associations by him or his firm with either the Bar Association of the District of Columbia or the District of Columbia Bar ("DC Bars"). What is being represented to this Court as a broad-based concern about the Ninth Circuit's decision can readily be seen to be only the obligatory assistance from a few business and professional associates of the petitioner and its New York and Washington, D.C. counsel.

The amicus motions raise various frivolous issues as their basis for requesting leave of this Court to file their amicus briefs, and respondent answers some of the issues below on a collective basis:

1. Motivation Survey. Movants claim that the only evidence was respondent's "motivation survey", but this is wholly false. In order to develop primary significance evidence, respondent commissioned a national survey. The director of the survey testified as respondent's expert witness that "The objective of the study was to determine whether consumers use the term 'Monopoly' primarily to denote the product or whether they use the term 'Monopoly' primarily to denote the producer" (2nd Trial Tr., p. 13-14). The survey used a purchaser motivation approach in its open-ended first ques-

tion: "Why would you buy Monopoly?" and a buyer's meaning-of-the-term "monopoly" approach in its structured second question -- both based on the Ninth Circuit's first opinion.

The second question was asked of interviewees after they had stated they were buyers or prospective buyers and after they had explained why they were motivated to buy Monopoly. .Therefore, the second question sought different information than buyer motivation evidence. It asked: "Which of these two statements best expresses your meaning when you ask for "Monopoly" in a store. I would like Parker Brother's Monopoly primarily because I like Parker Brother's products" or "I want a 'Monopoly' game primarily because I am interested in playing "Monopoly". I don't much care who makes it." (Emphasis added.) (PX 111 and

2nd Trial Tr. p. 20). The alternatives were buyer-oriented options, sharply differentiated as to product versus source indicators, especially in a situation where product is largely intangible game playing.

In response to the question "Was the phraseology 'I don't much care who makes it' put in there with any thought of how it would affect the response to that question?", respondent's expert witness Canapary testified: "Well, we wanted to make a clear-cut distinction between the two statements, between the product and source statements. And, by putting that in there, I think we made a very clear distinction. (2nd Trial Tr. p. 137).

These alternatives, hence, conformed to the significance approach also recommended at p. 7 of petitioner's Reply Brief. That is why the Ninth Circuit,

which had the full record before it wrote:
"In our earlier opinion we made it clear that what was relevant was the sense in which a purchaser used the word 'Monopoly' when asking for the game by that name. The survey was a reasonable effort to find that out and was modelled closely on what we said in our opinion." (Pet. App. at 16a).

In the second question¹ therefore, interviewees were not asked why they purchased Monopoly and then given the alternatives. Petitioner's attorneys lumped together the two different approaches to make it seem that there had been only a buyer motivational approach, as follows:
"People who had bought the game or intended to buy it had been asked why they would do so. By adaptation of the court of appeals' language, they were given a

choice of two statements:" (Pet. at 10-11) This is pure deception.

The amici, once misled on respondent's survey, try to dismiss it with an assertion that buyer motivation is totally irrelevant for trademark significance. This is immediately refuted by Justice Frankfurter (Pet. at 15): "A trademark is a merchandising shortcut which induces a purchaser to select what he wants..." (emphasis added).

It is also refuted by common sense since, if buyer motivation is irrelevant, there would be no need to protect trademark owners against infringement. The amici themselves warn this Court not to invalidate a trademark (erroneously) since this would give infringers free rein to motivate buyers to purchase the infringers' product in place of the one sold under the trademark.

In any case the amici need not worry. The Ninth Circuit has ruled that respondent will be enjoined unless it takes "reasonable care" to prevent confusion between the two different games.

2. Tide Survey. The Ninth Circuit's reference to the Tide survey was an aside which should be of no concern. Movant's argument is that a majority said Tide "does a good job" and claimed this was a product-related answer so that the "Tide" trademark was invalid under the Ninth Circuit rationale. But respondent's survey would have triggered further probing to determine if this answer had a product- or source-related meaning (2nd Trial Tr. p. 133). If the probing failed to elicit the proper distinction, the answer would have been put into the neutral category. But the Tide pollers who had not seen the Ninth Circuit

opinion probed for different reasons, rather than for a complete response to get at primary significance in conformity with the opinion.

Another claim by movants is that the Tide structured question generated a 68% product response which again was supposed to have invalidated the "Tide" trademark. But the Tide survey cannot be compared to respondent's survey because it did not replicate respondent's structured options. It simply asked "Would you buy TIDE primarily because you like Procter and Gamble's products or primarily because you like TIDE detergent?" These choices do not follow the Ninth Circuit's recommendations since the term "TIDE" in the second option "TIDE detergent" functions both as a product name and a source indicator and there is nothing else in that option to take out the source indica

tion. The correct replication of the second option is "I want TIDE detergent primarily because I am interested in washing my clothes. I don't much care who makes it." Also, the TIDE structured question was not a "meaning-of-term" question, and was only a motivation question. It did not ask interviewees "Which of these two statements best expresses your meaning when you ask for TIDE in a store?" (DX 177).

This exhibit was an attempt by petitioner to replicate a proposed survey by respondent, given to petitioner weeks before the second trial, which respondent never conducted because it lacked the meaning question and appropriate choice alternatives. Respondent's actual survey in evidence included these two corrections. Respondent's survey in evidence therefore was not repli-

cated by petitioner, because petitioner had refused to exchange completed surveys prior to trial.

3. Use of Survey in Other Courts.

The fear that the Ninth Circuit's primary significance test will be used in other courts without adaptation is baseless. The Ninth Circuit even stated (Pet. App. at 18a) that the Tide survey should be tailored to meet the situation, which would be the case for every use of it.

4. Shredded Wheat. Movants claim that Shredded Wheat involved a name which was generic at all times, and that respondent had not proved genericness prior to registration of the "Monopoly" trademark. This argument has no merit, see the Ninth Circuit's discussion of the post patent period (Pet. App. at 40a-42-a) and Respondent's Brief in Opposition, at pp. 51-53 for legislative history.

5. De Facto Secondary Meaning

Doctrine. Movants attack the de facto secondary meaning doctrine of existing trademark law. This doctrine is that evidence that the public associates a trademarked product with a single source is no evidence against genericness if a product which may be its own genus has only one producer. This doctrine follows logically from Shredded Wheat, which was incorporated into the Lanham Act (Br. in Opp. 47-55). Note especially the comments by Mr. Martin, who was then the chairman of the ABA's Trademark Committee (Br. in Opp. 53-54). To abolish this doctrine, the amici want this Court to accept the notion that a trademark must always be validated if the public knows that the trademarked product comes from a single source. If this Court revised the law accordingly, it would mean that the more successful a trademark owner is in

using his trademark to block competition, the more he could count on unhampered exploitation of his statutory trademark monopoly.

One of the clearest statements of the de facto secondary meaning doctrine is by T. McCarthy, the authority frequently cited by petitioner and its amici movants:

"De Facto Secondary Meaning might arise during the period when a seller is the single source for a genus of goods. (Then) the public might associate the generic name of the product with the single source merely because there is no one else on the market.... The single source situation might arise either because the seller has patent rights which foreclose others, or merely because no one other than a

single seller came into the market for some time due to economic considerations." 1 T. McCarthy, TRADEMARKS AND UNFAIR COMPETITION (1973) pp. 432-433.

6. Incontestability. Movants also advance the novel notion that the genericness constraint on the trademark incontestability clause means that the "common descriptive name" test should be applied only at the time of the filing of an incontestability affidavit. As far as respondent knows, no one else has ever made such a startling claim, especially in view of Sections 15 and 33b of the Lanham Act, 15 U.S.C. Sections 1065(4) and 1115b. Note also how this argument conflicts with the comments of Mr. Byerly, the father of the incontestability provision (Br. in Opp. 50-53).

7. De Facto Secondary Meaning

Again. Movants claim that the de facto secondary meaning doctrine does not apply in this case because Anti-Monopoly II held improperly that Monopoly is a genus of its own. Movants want to persuade this court that the game monopoly is only a product differentiated good competing with other similar products. Apparently, movants are not aware that the genus of one determination was first made by the trial judge (Br. in Opp. 34); it also conforms to obvious public knowledge (enabling the game to sell without any advertising whatsoever), and the patenting of the game's critical features, which no one else has used in a game until long after commencement of this action.

Swann is cited by petitioner for his article (see Pet. at 23; article pp. 358-359) on the genericness doctrine as applied to dual-functioning trademarks.

But Swann also asserts that the genericness of "Yo-Yo" is so obvious that it does not contribute significantly to the genericness doctrine given the narrowness and obviousness of the issues involved.

8. New York Times Article. The New York Times article by Ms. Lewin, cited by movants to show an alleged consternation about the Ninth Circuit's decision in the business community is based on statements made by petitioner's counsel, Oliver C. Howes, Jr., Esq., who is quoted in the article. Respondent's attorney was not contacted by Lewin in preparation for this article. The only issues raised in the article were petitioner's sham anonymity issue; the false motivation issue regarding respondent's survey; the false "sole evidence" argument; confusion about implications of the Tide survey; and failure to realize that

"Monopoly" was found by the courts to be its own genus and not simply a product-differentiated good competing with other similar goods.

9. AMA Seminar. Movants claim that various seminars are being offered on the Ninth Circuit's decision (p. 3, of United States Trademark Association brief). The only one known to exist is the AMA seminar, the focus of which is to educate trademark owners to conform with existing trademark law and has little to do with radical changes in trademark law alleged to follow from the two unanimous opinions of the Ninth Circuit. The quoted material is sales literature. The issues to be presented at the seminar in San Francisco and New York, led by respondent's attorney, includes the positions taken by petitioner, to present

a balanced view. Respondent has refused to participate in the seminar.

CONCLUSION

For the foregoing reasons, each of the 7 motions for leave to file an amicus brief in support of the petition for a writ of certiorari should be denied.

Respectfully submitted,

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